

**UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29**

MARSHALLS OF MA, INC.
Employer¹

and

Case No. 29-RC-10294

LOCAL 348-S, UNITED FOOD AND
COMMERCIAL WORKERS UNION, AFL-CIO
Petitioner²

DECISION AND DIRECTION OF ELECTION

Marshalls of MA, Inc. (the Employer) is engaged in the retail sale of clothing, shoes and other goods at various locations, including a store on 86th Street in Brooklyn, New York. Local 348-S, United Food and Commercial Workers Union, AFL-CIO (the Petitioner) filed a petition under Section 9(c) of the National Labor Relations Act on November 1, 2004, seeking to represent a unit of associates, processors, cashiers and coordinators employed at the 86th Street store. The Employer contends that the “backroom coordinator” must be excluded from the unit on the ground that he is a supervisor as defined in Section 2(11) of the Act, and that the “administrative coordinator” must be excluded as a confidential employee. The Petitioner disagrees with both of those contentions.

A hearing was held before Rachel Zweighaft, a Hearing Officer of the National Labor Relations Board. In support of its contentions, the Employer called two witnesses

¹ The Employer’s name appears as amended at the hearing.

² The Petitioner’s name appears as amended at the hearing.

to testify: Richard Coleman (district manager) and Rena Valdman (store manager). The Petitioner called James Kelly, the backroom coordinator, to testify.

As discussed in more detail below, I reject the Employer's contentions regarding the backroom coordinator and the administrative coordinator, and decline to exclude them from the petitioned-for classification of coordinators in the election directed below. Furthermore, I hereby deny the Employer's motion to dismiss the petition.³

FACTS

The facts are essentially undisputed, except where noted below.

Richard Coleman is the Employer's district manager for a district that includes northeast New Jersey and parts of New York. He visits each Marshalls store in his district, including the Brooklyn store, approximately two or three times per month. Rena Valdman is the store manager for the Brooklyn store; she reports to Coleman. There are also assistant managers there, who report to Valdman. (The store manager and assistant managers will hereinafter be referred to collectively as the "managers.")

The Employer's Brooklyn store contains a large, ground-level sales floor, with different areas for women's clothing, men's clothing, children's clothing and shoes. In back of the store, behind the shoe department, is a two-level stockroom (ground level and basement), where all the merchandise is received, sorted, tagged and otherwise processed before it is brought out to the sales floor. Trucks come three or four days per week to deliver merchandise to the store, via the loading docks in the back of the store. There is a locked chain-link fence outside the building near the loading docks, and a

³ On November 10, 2004, before the hearing began in this case, the Employer submitted a motion to dismiss the petition, on the ground that the backroom coordinator's alleged solicitation of cards and support for the Petitioner constituted "supervisory taint." However, inasmuch as I have concluded that the backroom coordinator is not a supervisor, the issue is moot.

locked roll-up gate at the loading docks. Only the managers have the master key to the outdoor fence and roll-up gate.

Backroom coordinator

The backroom coordinator, James Kelly, usually arrives between 6:30 and 6:45 in the morning. He waits at the fence for a manager to come with the key, to let him in. Other employees start to arrive at 7:00 a.m., which is when the delivery trucks start to arrive. When a truck arrives, Kelly must get the key from a manager again, to open both the outdoor fence and roll-up gate, to give the truck access to the loading area.

It generally takes up to four hours to unload the trucks, i.e., until approximately 11:00 a.m. The Employer has guidelines regarding how many employees are needed to unload and process the merchandise, depending on the number of boxes (e.g., 5 or 6 employees for 300 boxes, 9 employees for 500 boxes, and so forth). The Brooklyn store typically employs 10 to 12 people in the stockroom on any given day.

When a truck arrives, Kelly must verify the seal, to make sure it matches the bill of lading. He sets up 14 bins on the ground level near the loading dock (for stockroom employees to separate the merchandise into different categories) and rollers (to roll some boxes down to the basement level). As the truck is unloaded, Kelly must count all the boxes, and open them with a box cutter. For some reason, the boxes are not marked, so their exact content is unknown until the boxes are opened. Once the content is revealed, a group of 4 or 5 processors on the upper level sort the merchandise into the bins by category. Other processors work in the basement level, getting the clothes ready to go to the sales floor, for example, by attaching tags and hanging them on hangers. During the unloading process, Kelly stays primarily on the upper level, cutting open the hundreds of

boxes and sending them down the rollers to the processors. Nevertheless, if the basement stockroom gets too backed up, he sometimes will push boxes off the roller down there, so that he can come back up and continue to unload. If Kelly finds any problem with the seal or the wrong number of boxes, he must report it to management. After each truck is unloaded, Kelly gets the key again to let the truck out. Kelly's other duties include helping to affix loss-prevention tags to any items worth more than \$19.99, deciding when bins are ready for stockroom employees to bring to the sales floor, bringing bins out himself, and helping the managers monitor when certain merchandise on the sales floor needs to be replenished.

There is no dispute that Kelly generally oversees the day-to-day work in the stock room. District manager Coleman testified that Kelly assigns work to stockroom employees, although he did not give specific examples. Store manager Valdman testified specifically that Kelly tells stockroom employees how to sort the merchandise, and sets priorities for which merchandise needs to be processed and brought to the sales floor first. However, Kelly (who described himself as the stockroom "leader") denied having to assign work to employees on a regular basis. He testified that the employees already know what to do. According to Kelly, once employees have learned the "routine" during their first week of employment (e.g., men's clothing goes in the men's clothing bin, women's clothing goes in the women's clothing bin, etc.), they just use "common sense." During cross-examination, Valdman agreed that employees should be able to learn the process within a week of employment, at most. Kelly further testified that, after a truck is unloaded, he and the other stockroom employees decide collaboratively who should process the various bins, and who should bring merchandise

to the sales floor. Kelly stated that sometimes, if he needs to make sure that certain merchandise gets to the floor on time, he may tell an associate to bring it there, or bring it himself. Whenever a manager tells Kelly about a special store event (such as a shoe sale requiring stockroom employees to bring out more shoes than usual), Kelly conveys the information to employees, so they know what to do. There seems to be no dispute that Kelly generally monitors the stockroom employees' work. If they do something wrong, he may correct them, or he may bring it to a manager's attention. Both Coleman and Valdman testified generally that Kelly provides feedback to management, which may inform management's written evaluation of stockroom employees. However, Kelly does not write the employees' evaluations, and there is no evidence that he makes recommendations regarding their potential wage increases.

Valdman initially testified that, if a manager takes an employee out of the stockroom to work on the sales floor, if Kelly decides the employee is still needed in the stockroom, Kelly has authority to call the employee back to the stockroom. However, on cross-examination, Valdman admitted that Kelly would have to ask the manager first. Likewise, Kelly testified that if he wants to re-assign any downstairs stockroom employees to work upstairs, or vice versa, he must ask a manager first. Valdman generally testified that Kelly may assign employees to different tasks without her approval, whereas Kelly testified generally that he does not make any decisions without management's approval. No specific examples were given by either witness.

There is no dispute that the Employer's managers devise the weekly schedule for stockroom employees, and that only managers may grant requests to take time off or to leave early. Employees who call in sick or absent speak to a manager, not to Kelly.

However, the witnesses disputed the backroom coordinator's authority to schedule employees' lunch times and other break times. Both Coleman and Valdman testified that Kelly decides when employees may take their breaks, depending on when the trucks are unloaded and other circumstances in the stockroom. However, Kelly testified that employees generally work out their break times among themselves, within certain parameters,⁴ and that he does not assign them. He initially stated that employees simply inform him when they go on break, so he knows of their whereabouts if a manager asks him. Nevertheless, Kelly admitted that, if too many employees tried to take their break at the same time, he could ask some to go at a different time, or bring the problem to a manager's attention. He also admitted that he helps monitor whether employees return from lunch on time. If Kelly suspects that an employee has been gone for more than a half hour, he asks a manager to check the employee's time card; then either Kelly or the manager may verbally reprimand the employee for a late return.

As noted above, employees must arrive as early as 7:00 a.m. to unload the first trucks, and the Employer evidently has some trouble getting employees to arrive on time at that early hour. There is no dispute that Kelly helps monitor whether employees arrive on time, in addition to the Employer's use of time card records. Both he and Valdman testified that if he notices a pattern of lateness, he may informally "counsel" the employee, or he may ask a manager to do a more formal counseling. The record contains three examples of employees (Ritchie, Dennis and Virginia) who were given

⁴ Employees do not take their breaks all at the same time but, rather, at staggered times, to maintain coverage of the stockroom. No one may take a break until the trucks are unloaded, and the unloading process takes up to four hours. Therefore, stockroom employees generally do not start taking their breaks until after 11:00 a.m. Stockroom employees may take a half-hour for lunch, at staggered times between 12:00 noon and 1:30 p.m. Employees have to "punch out" their time cards at break time, and punch back in upon their return.

verbal warnings⁵ for lateness/attendance problems by a manager, in meetings that Kelly also attended. Kelly did not talk during these meetings, and he has no idea whether anything was written in the employees' records. There is no dispute that the backroom coordinator has no authority to issue written warnings, or even to attend meetings for written warnings. (Valdman explained that Kelly cannot attend written warning meetings because they are considered "confidential" between the employee and management.) Kelly has no authority to suspend or terminate employees, and there is no evidence that he has even recommended such actions.

Kelly testified that he cannot independently authorize overtime work. However, if a manager gives him permission to assign overtime work, Kelly may do so.

There is no evidence that the backroom coordinator has authority to hire, transfer, lay off, recall, promote or reward employees, or to adjust their grievances, or effectively to recommend such actions. In fact, when management decided to transfer an employee (Ritchie) from the stockroom to the sales floor two months ago, Kelly claims that management did not seek his input, or even tell him until after the fact.

Coleman and Valdman testified that Kelly is the only person "responsible" for operating the stockroom. However, the record indicates there is always at least one manager in the building, and that the managers communicate with Kelly several times per day. For example, Valdman testified that she goes to the stockroom approximately four or five times per day. Kelly also stated that managers are available by telephone.⁶

⁵ A "counseling" with a manager is considered a "verbal warning," even though the manager makes a written notation on the employee's "associate record card." A "written warning" is considered the next level in the progression of discipline.

⁶ An assertion on p. 4 of the Employer's post-hearing brief, that the assistant managers are responsible only for the sales associates and have "no responsibility" for the stockroom employees, is not supported by the record. Rather, the record has many examples of the assistant managers' involvement

Valdman testified that she has meetings with her assistant managers, and that coordinators sometimes attend, depending on the topic. If they discuss a goal or priority involving the stockroom, then Kelly would attend.

The backroom coordinator is paid \$11 per hour. The Employer's witnesses described his hourly wage as being higher than the other employees, although they did not give specific numbers. Kelly punches a time card, as do the other stockroom employees, and is eligible for overtime pay. He is also eligible for some kind of medical benefits, but the record does not clearly indicate what the difference is between management's benefits and rank-and-file employees' benefits.

Administrative coordinator

Both Coleman and Valdman testified regarding the duties of the administrative coordinator, Lauren Lyons. A written job description was introduced into evidence (Employer Exhibit 4). Lyons herself did not testify.

The record indicates that the administrative coordinator assists with certain personnel functions and handles the related documents. For example, she "pre-screens" job applicants by going through a five-point questionnaire (indicating full-time or part-time, previous retail experience, etc.) and forwards the questionnaire to a manager, who then interviews the applicant. Once a manager decides to hire someone, Lyons checks the references and collects the necessary paperwork (including tax forms, immigration forms, emergency contact information) and opens a new personnel file.

with the stockroom, including opening the gates with the master key, taking calls from stockroom employees who are calling in sick or absent, granting employees' requests for time off, asking Kelly or other employees to take merchandise out to floor, resolving problems with the seal test, checking stockroom employees' time cards if they come back late from lunch, receiving feedback from Kelly regarding the employees' performance, authorizing overtime, etc.

Thereafter, the administrative coordinator generally maintains the personnel files. This entails updating and filing documents regarding employees' pay rates, annual evaluations, pay increases, medical records (in cases of medical leave or workers compensation), attendance and disciplinary records. Lyons also enters relevant personnel information into the Employer's computer system. She is the only person with access to this personnel data, other than the managers.

Lyons also checks employees' time cards for discrepancies, and resolves those discrepancies. She notes instances of lateness or absence on each employee's "associate record card."

The administrative coordinator's duties also include reconciling the store's paperwork for preparing the daily deposit and other "cash office" duties, and managing the store's budget for supplies. She reports to the store manager (Valdman) and/or the operations manager (name not disclosed).

Valdman testified that the Employer's corporate office in Massachusetts determines employees' wage ranges, benefits, paid holidays and vacation leave.

DISCUSSION

Backroom coordinator

For reasons explained in more detail below, I find that the backroom coordinator is not a supervisor as defined in the Act.

Section 2(11) of the Act defines a supervisor as follows:

The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in

connection with the foregoing the exercise of such authority is not merely of a routine or clerical nature, but requires the use of independent judgment.

In enacting Section 2(11)'s definition of "supervisor," Congress stressed that only individuals invested with "genuine management prerogatives" should be considered supervisors, as opposed to "straw bosses, leadmen ... and other minor supervisory employees." Quadrex Environmental Co., Inc., 308 NLRB 101, 102 (1992)(quoting S.Rep. No. 105, 80th Cong., 1 Sess. 4 (1947)). It has long been the Board's policy not to construe supervisory status too broadly, since a finding of supervisory status deprives individuals of important rights protected under the Act. Id. A party who seeks to exclude alleged supervisors from a bargaining unit therefore has the legal burden of proving their supervisory status. NLRB v. Kentucky River Community Care, 532 U.S. 706 (2001)(“Kentucky River”); Tucson Gas & Electric Co., 241 NLRB 181 (1979); The Ohio Masonic Home, Inc., 295 NLRB 390, 393 (1989). Furthermore, to prove supervisory status under Section 2(11), the party must demonstrate not only that the individual has certain specified types of authority over employees (e.g., to assign or responsibly direct them), but also that the exercise of such authority requires the use of "independent judgment," and is not “merely routine or clerical” in nature.

In the Kentucky River decision, *supra*, the Supreme Court reaffirmed that the burden of proving supervisory status rests on the party asserting it. However, the Court rejected the Board’s interpretation of “independent judgment” in Section 2(11)’s test for supervisory status, i.e., that alleged supervisors do not use “independent judgment” when they exercise ordinary professional or technical judgment, or judgment based on greater experience, in directing less-skilled employees to deliver services in accordance with employer-specified standards. Thus, the Board must seek to interpret the statutory

distinction between “routine” and “independent” judgment, without categorically discounting judgment based on professional/technical expertise or greater experience.

The Board has done so in such post-Kentucky River cases as Beverly Health and Rehabilitation Services, Inc., et al., 335 NLRB 635 (2001), *enforced in relevant part*, 317 F.3d 316 (D.C. Cir. 2003), where nursing-home LPNs’ role in directing the work of CNAs was seen as requiring only “routine” authority rather than independent judgment. Id. at fn. 3. In that case, the Board upheld the administrative law judge, who found that the CNAs’ work was repetitive, and that the LPNs simply had to relate the patients’ care requirements from a written report. There was no evidence that the LPNs used independent judgment in assigning the “basic tasks” to particular CNAs, who all performed “the same care, in the same manner, for the same people” every day. Id., slip op. at 35. The Board did not rely on any distinction -- rejected by the Supreme Court -- between the LPNs’ use of technical judgment in deciding on patient care, versus supervisory judgment in deciding how to delegate the specific tasks. Nevertheless, the LPNs’ direction of CNAs’ work did not require the level of independent judgment to warrant a finding of supervisory status.

Similarly, in Los Angeles Water and Power Employees’ Association, 340 NLRB No. 146 (2003), a lead clerical employee was found to be non-supervisory although she occasionally told employees to fill in for one another. Since all the clerical employees were cross-trained to cover for one another, the lead clerical’s role was simply to notify employees when they needed to assume that role. The Board held that this “routine shifting of employees” does not evidence supervisory status. Id., slip op. at 3, citing Hexacomb Corp., 313 NLRB 983, 984 (1994)(finding that individuals are not supervisors

despite authority to “shift employees around ... to get projects done”). *See also* Quality Mechanical Insulation, Inc., 340 NLRB No. 91 (2003)(foreman’s authority to assign various types of insulation work to employees, where all employees were expected to perform every type of insulation necessary, does not require independent judgment).

By contrast, in another post-Kentucky River case, the Board found towboat pilots to be supervisors, in part because their direction of the boat crew required independent judgment. American Commercial Barge Line Co., 337 NLRB 1070 (2002). In that case, the pilots had authority to post one or more lookouts and to assign an extra crew member whenever they deemed necessary, even if this assignment entailed overtime pay. Significantly, these judgments were based on the pilots’ assessment of the crew (e.g., whether a “green” or inexperienced crew member was on board), as well as other “nonroutine” factors (weather, traffic, the boat’s condition, the type of cargo, and so forth). Id., 337 NLRB at 1071. The Board explicitly rejected any purported distinction between the pilots’ greater technical expertise/experience and their supervisory authority. Id., at 1071-2.

These cases suggest that simply dividing up tasks among “interchangeable” employees who essentially perform the same work is routine, whereas assessing the relative skills of different employees in directing their work may require independent supervisory judgment. *See also* Franklin Hospital Medical Center, 337 NLRB 826, 830 (2002)(“Franklin Hospital”), citing Brusco Tug & Barge Co. v. NLRB, 247 F.3d 273, 278 (D.C. Cir. 2001)(“Courts typically consider assignment *based on assessment of a worker’s skills* to require independent judgment,” emphasis added). In addition, the Board has held that assignment of tasks within employer’s pre-established parameters, or

based on such obvious factors as whether an employee's workload is light, does not require independent judgment, Franklin Hospital, *supra*, 337 NLRB at 830, and that decision-making governed by "common-sense considerations" is not supervisory, NLRB v. Meenan Oil Co., 139 F.3d 311, 321 (2nd Cir. 1998), citing B.P. Oil Co., Inc., 256 NLRB 1107, 1109-10 (1981), *enfd.* 681 F.2d 804 (3rd Cir. 1982).

Finally, the Board has held that conclusionary statements by witnesses, without specific evidence to support those statements, do not demonstrate supervisory status. Sears, Roebuck & Co., 304 NLRB 193 (1991). Specifically, the Board has held that proving the use of independent judgment in assigning employees requires "concrete evidence" showing how assignment decisions are made. Franklin Hospital, *supra*, 337 NLRB at 830. *See also* Nathan Katz Realty, LLC, et al. v. NLRB, 251 F.3d 981, 990 (D.C. Cir. 2001)(employer's claim that alleged supervisors exercise independent judgment by balancing "conflicting demands" rejected, without specific evidence in the record to support the claim).

In the instant case, I find that the Employer has not met its burden of proving that the backroom coordinator uses independent judgment in assigning or directing employees. Although the record indicates Kelly generally oversees the stockroom, including assigning tasks at times, there is no evidence that such assignments require independent judgment, such as assessing employees' skills or other relatively complex factors. For example, there is no evidence that Kelly needs any significant judgment to select which employee should bring particular merchandise to the sales floor. Rather, it appears that any assignment involves fairly routine "shifting" of employees to get the work done, using "common-sense considerations." Hexacomb Corp., *supra*, and B. P

Oil Co., *supra*. The routine nature of any assignments is also underlined by the fact that the stockroom employees themselves “know what to do” -- even new employees need no more than a week to learn the routine.

The cases cited in the Employer’s brief do not prove otherwise. For example, although the Employer correctly cites such cases as Rose Metal Products, Inc., 289 NLRB 1153 (1988), and Juniper Industries, Inc., 311 NLRB 109 (1993), wherein the findings of “independent judgment” were based on the supervisors’ assessment of employees’ skills, the record in the instant case shows no such assessment. The Employer also cites, Custom Bronze & Aluminum Corp., 197 NLRB 397 (1972), in which the lead welder was found to be a supervisor in part because he had the “*sole responsibility*” (emphasis in original) for assigning the workload, and because his superiors “hardly ever” went into the work area. In the instant case, by contrast, the Employer’s argument that the backroom coordinator is solely “in charge” of the stockroom is undercut by the constant presence of managers in the store, and his frequent consultation with those managers.

Ultimately, since the Employer seeks to exclude the backroom coordinator from the petitioned-for unit, it is the Employer’s burden to prove his supervisory status. The Employer argues that Kelly is a statutory supervisor inasmuch as his assignment and direction of employees requires independent judgment. However, the record contains no specific, concrete evidence to support that claim, such as examples demonstrating that Kelly must assess the employees’ skills or other non-routine factors. I therefore find that the Employer has failed to meet its burden in this regard.

Likewise, Kelly's role in disciplining employees does not rise to the level of statutory supervision. The record indicates that Kelly may tell an employee not to be late, but this informal "counseling" has no impact whatsoever on the employee's job status. Kelly's role in any formal "counseling" is essentially limited to bringing the matter to management's attention, and sitting in the room when a manager speaks to the employee. He does not even have independent authority to issue a written warning. It is well established that "reportorial" warnings, which bring employee misconduct to management's attention but do not have any independent effect on the employee's job status, do not demonstrate supervisory authority. Williamette Industries, 336 NLRB 743, 744 (2001); Franklin Hospital, 337 NLRB at 830; NLRB v. Meenan Oil Co., 139 F.3d at 322; Nathan Katz Realty, 251 F.3d at 989.

The Employer's brief cites Concourse Village, Inc., 276 NLRB 12 (1985), where the employer adopted a rule that three written warnings would automatically result in an employee's termination. In that case, the Board found that the superintendents' independent authority to issue written warnings was indeed supervisory, since the warnings could have a "definite and severe effect" on the employee's status. Id. at 13. However, the instant case is not comparable to Concourse Village. The backroom coordinator herein has no involvement in written warnings, and in fact is purposely excluded from such discipline due to confidentiality concerns. Furthermore, there is absolutely no evidence that the "counselings" or warnings have any automatic or definite impact on the employees' status.

Furthermore, Kelly's role in monitoring employees' break times is inconsequential. Even if Kelly actually assigns the break times (which he denies), such

assignment occurs within the Employer's well-established parameters, and does not require any significant judgment.

Finally, there is no evidence that the backroom coordinator has authority to hire, transfer, suspend, lay off, recall, promote, discharge, reward or discipline employees, to adjust their grievances, or effectively to recommend such actions. Absent proof of such "primary" statutory criteria, proof of any secondary indicia (e.g., earning a higher wage rate, attending management meetings) is insufficient to support a finding of supervisory status. Training School at Vineland, 332 NLRB 1412, 1417 (2000).

Accordingly, based on the foregoing, I find that the backroom coordinator is a non-supervisory employee, and I decline to exclude that position from the petitioned-for classification of "coordinators" in the election directed below.

Administrative coordinator

The Board defines confidential employees as those who "assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations." B.F. Goodrich Co., 115 NLRB 722, 724 (1956), approved in NLRB v. Hendricks County Rural Electric Membership Corp., 454 U.S. 170, 108 LRRM 3105 (1981). The Board has developed a very limited definition of confidential employees. Inland Steel Company, 308 NLRB 868, 872 (1992). First, the definition applies only to those who assist *managerial* employees, not those who assist mere supervisors. Ford Motor Co., 66 NLRB 1317 (1946). Second, as indicated above, the manager must exercise managerial functions *in the field of labor relations*, the so-called "labor nexus" test. B.F. Goodrich, *supra*. Furthermore, although in some earlier cases the Board excluded any employee who worked closely with a labor-relations

manager, *e.g.* B.F. Goodrich, *supra*, and Prince Gardner, 231 NLRB 96, 97 (1977), in subsequent cases the Board conducted a more detailed review of the exact information to which the assistant has access. It is well settled that mere access to confidential personnel files and documents, the mere preparation of statistical data to be used in contract negotiations, and the mere retrieval of personnel information to be used by management for grievance handling, do not render an employee confidential within the Board's narrow definition. The Bakersfield Californian, 316 NLRB 1211 (1995); Inland Steel, *supra*, and cases cited therein at p. 877. Rather, under these cases, an employee will be excluded as confidential only if his or her close working relationship with a manager causes him or her to be entrusted with information regarding labor policy formulation (such as bargaining proposals and strategies), the disclosure of which could impair the manager's ability to deal with the union. The party asserting confidential status has the burden of proof. Crest Mark Packing Co., 283 NLRB 999 (1987).

In this case, the Employer's evidence falls far short of proving that the administrative coordinator is a confidential employee. First, the Employer has not proved that Lyons works with *managers who formulate, determine, and effectuate management policies in the field of labor relations*, as opposed to supervisors who merely administer those policies. There is no evidence that the Brooklyn store manager (as opposed to the Employer's corporate headquarters) exercises *managerial* functions in the field of labor relations. Furthermore, even if one assumes for the sake of argument that the store manager meets the so-called "labor nexus" test, there is no evidence that the administrative coordinator has access to the type of confidential information described above, such as bargaining proposals and strategies. Rather, it appears that her access is

limited to personnel files. While personnel files may contain information which is “confidential” in the ordinary sense of the word, they do not constitute confidential information as the Board has narrowly defined it in the cases cited above. The Board has repeatedly held that mere access to personnel files does not warrant a finding of confidential status.

Accordingly, I find that the administrative coordinator is not a confidential employee as defined by the Board, and I decline to exclude her classification from the petitioned-for classification of coordinators.

CONCLUSIONS AND FINDINGS

Upon the entire record in this proceeding, I conclude and find as follows:

1. The Hearing Officer’s rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The parties stipulated that Marshalls of MA, Inc., is a domestic corporation with its principal office and place of business located at 770 Cochituate Road, Framingham, Massachusetts, and with a location at 1832 86th Street, Brooklyn, New York. It is engaged in the retail sale of clothing, shoes and other goods. During the past year, the Employer derived gross revenues in excess of \$500,000, and purchased and received at its Brooklyn store, goods valued in excess of \$5,000 directly from suppliers outside the State of New York. I find that the Employer is engaged in commerce within the meaning of the Act, and that it will effectuate the purposes of the Act to assert jurisdiction in this case.

3. Local 348-S, United Food and Commercial Workers Union, AFL-CIO, is a labor organization as defined in Section 2(5) of the Act, and claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. I hereby find that the following employees constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time processors, cashiers, sales associates, service desk associates, fitting room associates, mark down associates, lay-away associates, maintenance associates and coordinators employed by the Employer at its 1832 86th Street facility, but excluding loss prevention employees, managers, assistant managers, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by Local 348-S, United Food and Commercial Workers Union, AFL-CIO. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily

laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. North Macon Health Care Facility, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list

should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office on or before **December 23, 2004**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (718) 330-7579. Since the list will be made available to all parties to the election, please furnish a total of **two** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EST by **December 30, 2004**. The request may **not** be filed by facsimile.

Dated: December 16, 2004.

Alvin Blyer
Regional Director, Region 29
National Labor Relations Board
One MetroTech Center North, 10th Floor
Brooklyn, New York 11201